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MARRIED WOMEN'S RIGHTS IN COMMUNITY PROPERTY UNDER THE LAW OF CALIFORNIA.

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The first legislature of the State of California adopted, on April 13, 1850, the common law of England as the rule of decision in all the courts of the State. Four days later "An Act defining the Rights of Husband and Wife" was enacted whereby estates by the curtesy and estates in dower were abolished and the institution of community property, borrowed from the civil and Spanish law, was established. Community property of husband and wife, as defined by this statute and subsequently by our civil code, consists of all property acquired, during the existence of the marriage relation, by either husband or wife or both, except such as is acquired by gift, bequest, devise or descent. All other property, together with its rents, issues and profits, is separate property; and neither husband nor wife has any interest in the other's separate property. The Act of April 17, 1850, did, indeed, declare that the "rents and profits of the separate property of either husband or wife shall be deemed common property." But this clause of the Act was declared to be repugnant to our State Constitution in the case of *George v. Ransom*, 15 Cal. 322, wherein separate property of the wife is defined as "an estate held, as well in its use as in its title, for the exclusive benefit and advantage of the wife." And such has been the established law ever since.¹

The theory underlying the legal distinction between separate and community property is that the latter is produced by the joint efforts of the husband and wife; the relation between

¹ Const. of 1849, Art. XI, Sec. 14; Const. of 1879, Art. XX, Sec. 8; Stats. of 1850, Chap. 103, Secs. 1, 2, 9 and 10; Stats. 1853, p. 165; Civil Code, Secs. 161-164, 169 and 173.

them, in respect of property, being considered as a species of partnership,² though, as we shall see, the wife's interest in the partnership assets is almost nominal.

The courts, in determining the character of property as community or separate, have always acted upon the presumption that all property owned by either husband or wife, or both, is community property, and have cast upon the person asserting the contrary the burden of proving, by clear and convincing evidence, its separate character. This presumption is considered not merely a rule of evidence, but a rule of property.³ The most important exceptions to the rule that property acquired by purchase during marriage is presumed to be community property occur in cases where property is conveyed to the wife by the husband or is expressly declared to be for her sole and separate use.⁴ This presumption, however, when applied to conveyances of land to married women, was not in harmony with the purpose of the recording laws, and not infrequently occasioned confusion in land titles. To remedy this evil the legislature in 1889, by an amendment of Sec. 164 of the civil code, provided that "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property * * * and the presumption is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration." The true character of property as separate or community, it will be observed from an examination of the authorities cited, does not depend much upon forms of conveyancing, but rather upon the time and mode of its acquisition.⁵

The entire management and control of the community property, and the absolute power of disposition thereof during the existence of the marriage relation are, with certain exceptions to be noted, vested in the husband.⁶ Even though land or other property be granted or otherwise transferred to the

² *De Godey v. Godey*, 39 Cal. 157; *Frankel v. Boyd*, 106 Cal. 608.

³ *Meyer v. Kinzer*, 12 Cal. 247; *Jordan v. Fay*, 98 Cal. 264; *Estate of Boody*, 113 Cal. 682.

⁴ *Taylor v. Opperman*, 79 Cal. 468; *Carter v. McQuade*, 83 Cal. 274; *Sanchez v. Grace M. E. Church*, 114 Cal. 295.

⁵ *Peiser v. Griffin*, 125 Cal. 9; *Jackson v. Torrence*, 83 Cal. 521; *Estate of Bauer*, 79 Cal. 305.

⁶ Stats. of 1850, Chap. 103; Civil Code, Sec. 172.

wife, if it be in fact acquired otherwise than by gift, bequest, devise or descent, the husband can by his deed or other appropriate instrument of conveyance, and without the consent or concurrence of the wife, effectually transfer it.⁷ The husband until 1891 even had the right to make a voluntary disposition of a reasonable portion of the community property, without the consent of the wife. Such a disposition was, however, voidable at the instance of the wife, if made with intent to defraud her; yet she could not, during her coverture, maintain an action to set aside such fraudulent disposition; and it is doubtful if she has any preventive remedy.⁸ The legislature, by an amendment to Sec. 172 of the civil code adopted in 1891, deprived the husband of the power to make a gift of community property without the written consent of the wife. But this amendment has been held inapplicable to community property theretofore acquired.⁹ The husband ever since May 8, 1861, has had the right, as against his wife, to devise and bequeath one-half of the community property, but not more.¹⁰ That the husband had the power by will to dispose of one-half of the community property before May 8, 1861, though formerly doubted, was sustained by the Supreme Court in the case of *Payne v. Payne*, 18 Cal. 291, 301, construing Sec. 11 of Chap. 103 of the Statutes of 1850. A different opinion was expressed as a *dictum* in the case of *Jewell v. Jewell*, 28 Cal. 232; though the decision in *Payne v. Payne*, *supra*, does not appear ever to have been overruled. Upon principles equally applicable to all kinds of property, the husband, by clearly manifesting his intention to bequeath and devise more than one-half of the community property, may put his widow to her election to take under the will or to accept the provision made for her by the law.¹¹ The husband may also, by his will, empower his execu-

⁷ *Tustin v. Faught*, 23 Cal. 237; *Meyer v. Kinzer*, 12 Cal. 247; *Tolman v. Smith*, 85 Cal. 280; *Fallbrook Irrig. Dist. v. Abila*, 106 Cal. 355; *Peiser v. Griffin*, 125 Cal. 9.

⁸ *Lord v. Hough*, 43 Cal. 581; *Greiner v. Greiner*, 58 Cal. 115; *Smith v. Smith*, 12 Cal. 216; *Corker v. Corker*, 95 Cal. 308; *Sun Ins. Co. v. White*, 123 Cal. 196.

⁹ *Spreckels v. Spreckels*, 116 Cal. 339.

¹⁰ Stats. of 1861, p. 310; Stats. of 1863-64, p. 363; Civil Code, Sec. 1402; *Estate of Frey*, 52 Cal. 658.

¹¹ *Estate of Gilmore*, 81 Cal. 240; *Estate of Smith*, 108 Cal. 115; *Estate of Stewart*, 74 Cal. 98.

tor to sell or otherwise dispose of any portion of the community property for the purpose of satisfying and discharging all of his debts and all claims and demands for which the community property may, during his lifetime, be taken in execution, but for no other purpose.¹² When the marriage is dissolved by the death of the husband, the whole of the community property becomes assets of his estate, chargeable with all of his debts, and is to be administered upon by his personal representatives.¹³

During coverture the wife has never had any power to control, manage or dispose of the community property, whether it was acquired in the name of herself or of her husband; for in either case both the legal and the equitable title is in the husband. An attempt on the part of the wife to dispose of community property, whether real or personal, is an absolute nullity.¹⁴

Under the provisions of Sec. 11, Chap. 103 of the Statutes of 1850, prior to its amendment by an act approved May 8, 1861, upon the dissolution of the marriage by the death of the wife, one-half of the community property vested absolutely in the husband, and the other half vested in the descendants of the deceased wife, or, if there were no descendants, then in the surviving husband; but in neither case did any portion of the community property become assets of the deceased wife's estate, or liable to be administered upon by her personal representative. The whole of the community property, however, remained liable to be taken for the debts previously incurred by the husband. The husband, as the survivor of the marital community, had the right to continue in possession of the community property, and to control and dispose of it for the purpose of satisfying and discharging all the liabilities which he had previously incurred. The husband, indeed, had not the power to bind the interests of his wife's descendants in the community property for any debt contracted after the wife's death. But a purchaser from the surviving husband, in good faith and for a valuable consideration, of the community property, acquired good title thereto, as against the

¹² *Sharp v. Loupe*, 120 Cal. 89.

¹³ *Estate of Tompkins*, 12 Cal. 114; Stats. of 1850, Chap. 103, Sec. 11; Stats. of 1861, p. 310; Stats. of 1863-64, p. 363; Civil Code, Sec. 1402.

¹⁴ *Peiser v. Griffin*, 125 Cal. 9; *Dean v. Parker*, 88 Cal. 283.

wife's descendants.¹⁵ Subject to the surviving husband's right of possession and control for the purposes of satisfying existing indebtedness, the descendants of the deceased wife became tenants in common with the surviving husband, and were entitled to maintain either an action for the partition of the property in specie, or in case the property was disposed of by the surviving husband, an action for an accounting and to recover their share of the net proceeds.¹⁶

Ever since May 8, 1861, with the exception of the period of time from January 1, 1873, to July 1, 1874, upon the dissolution of the marriage by the death of the wife, the entire community property has vested in the husband immediately and without administration, and the wife has never had the right to devise or bequeath any of the community property.¹⁷ From January 1, 1873, until July 1, 1874, Sec. 1401 of the civil code provided that if the husband shall have abandoned his wife and lived separate and apart from her, one-half of the community property subject to the payment of the debts chargeable to it, is at the wife's testamentary disposition, and in the absence of such disposition, goes to her descendants or heirs at law, exclusive of her husband. Since July 1, 1874, any community property which may have been set apart to the wife by judicial decree for her support and maintenance, is in effect made her separate property, subject to her testamentary disposition, and in the absence of such disposition, capable of being inherited by her descendants or heirs, exclusive of her husband.

Under the statute of April 17, 1850, upon the dissolution of the marriage by the death of the husband, the wife succeeded to one-half of the community property if there were descendants of the husband, otherwise to the whole thereof, subject only to the payment of the debts of the deceased husband. This statute was amended by an act passed May 8, 1861, providing that, in the absence of descendants of the deceased husband, if he failed to exercise his right of testamentary disposition, his half of the community property, if we may so designate it, should be succeeded to in the same manner as his sepa-

¹⁵ *Packard v. Arellanes*, 17 Cal. 525; *Cook v. Norman*, 50 Cal. 633; *Johnston v. S. F. Savings Union*, 75 Cal. 134.

¹⁶ *Broad v. Broad*, 40 Cal. 493; *Ord. v. De La Guerra*, 18 Cal. 67.

¹⁷ Stats. 1861, p. 310; Stats. 1863-64, p. 363; Civil Code, Secs. 1273, 1401.

rate estate; and under the general Statute of Descents and Distributions, the wife has always been, in this State, entitled to succeed, as heir, to a portion of her deceased husband's separate property; and this has been the law ever since.¹⁸

The courts of this State have experienced very great difficulty in attempting to define, in terms of the common law, the title by which the wife, upon the death of her husband, becomes the full and complete owner of one-half of the community property, and some confusion of thought has necessarily resulted. In the case of *Burdick's Estate*, *supra*, there was presented for adjudication the question whether the wife upon the death of her husband, takes title to her one-half of the property by survivorship or by succession as an heir. Dealing with this question, the Court, speaking by Mr. Justice Temple, said: "The legal title to the community property is in the husband. He has the absolute dominion and control of it, and the wife has no right or title of any kind in any specific property, but a possible interest in whatever remains upon a dissolution of the community otherwise than by her own death. This cannot be classified as any species of estate known to the law." The Court held that the wife takes title by succession, that is by descent. Two of the justices, concurring specially, declared it as their opinion, that the wife upon the death of her husband, receives one-half of the community property "not as the heir of her husband, but in her own right as her half of the property which was acquired by herself and her husband during the marriage, and freed from all restrictions in its use and enjoyment, and with the same title as if the marriage had been dissolved by a decree of divorce." The doctrine of the majority of the Court *in re Burdick's Estate*, is now, however, considered as settled law.¹⁹

The act of April 17, 1850, provided that in case of the dissolution of the marriage by decree of any court of competent jurisdiction, the common property should be equally divided between the parties, and that the court granting the decree should make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the particular case should require. This stat-

¹⁸ Stats. 1863-64, p. 363; Civil Code, Sec. 1402; *Jewell v. Jewell*, 28 Cal. 233; *Estate of Boody*, 113 Cal. 682; *Estate of Burdick*, 112 Cal. 387; *Cunha v. Hughes*, 122 Cal. 111.

¹⁹ *Cunha v. Hughes*, *supra*.

ute was amended April 14, 1857 (Stats. 1857, p. 199), by providing that when a decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof shall only be entitled to such portion of the common property as the court granting the decree may in its discretion deem just. The statute as amended was substantially re-enacted in sections 146 and 147 of the civil code.

Under these statutes, the effect of a decree of divorce in a case wherein no issues are presented involving the community property, and no relief in respect thereto is sought, is to make the husband and wife technically equal tenants in common of all the community property; and the parties to the divorce proceedings may thereafter have their property partitioned in the same manner as other tenants in common.²⁰

When a decree of divorce is granted upon the ground of adultery or extreme cruelty, the injured party is entitled at least to something more than one-half of the community property, and the court may in its discretion, award to the innocent party the whole of the community property, or a portion thereof, together with a lien upon the residue to secure any payment which the husband may be ordered to make for the support of the wife.²¹

If the court in granting a decree of divorce to the wife, assigns to her all of the community property, leaving the husband without separate property wherewith to pay his existing indebtedness, the property so assigned is taken subject to the right of creditors to enforce payment of their demands against it to the same extent as if the property had continued to belong to the husband, provided such claims arose out of transactions intended to benefit the marital community. The proper procedure for the creditor to pursue is to file a creditor's bill after the recovery of judgment against the husband.²²

The wife may, without the concurrence of her husband, declare a homestead upon either his separate or his community property, and thereafter the property selected as a homestead is not only exempt from execution or forced sale, but also can-

²⁰ *De Godey v. Godey*, 39 Cal. 157; *McLeran v. Benton*, 31 Cal. 29; *Kirschener v. Dietrich*, 110 Cal. 502; *Biggi v. Biggi*, 98 Cal. 35; *Reid v. Reid*, 112 Cal. 274.

²¹ *Eslinger v. Eslinger*, 47 Cal. 62; *Miller v. Miller*, 33 Cal. 353; *Brown v. Brown*, 60 Cal. 579; *Strozyński v. Strozyński*, 97 Cal. 189; *Rose v. Rose*, 112 Cal. 341; *Gaston v. Gaston*, 114 Cal. 542.

²² *Frankel v. Boyd*, 106 Cal. 608.

not be conveyed or incumbered save by an instrument executed and acknowledged by both husband and wife.²³ The rights of the survivor of the marital community in the homestead differ according to whether it was selected from community or separate property; as do also the rights of the parties to a divorce suit. A discussion of the homestead law would unduly prolong this paper and must therefore be omitted. Strictly speaking, married women have no rights in community property other than those already discussed.

²³ Civil Code, Secs. 1238, 1240 and 1242.